YONG YEU SIN

v.

VS WONG'S MOTOR SDN BHD

HIGH COURT SABAH & SARAWAK, MIRI
ZULKIFLI BAKAR J
[BANKRUPTCY PROCEEDING NO: 29-135-2002 (MR)]
21 JANUARY 2009

BANKRUPTCY: *Adjudication and receiving order - Annulment of - Creditor's petition filed on 10 March 2003 - Amendment to s. 5(1)(a) Bankruptcy Act 1967 on 1 October 2003 - Statutory limit increased from RM10,000 to RM30,000 - Adjudication and receiving order granted on 10 October 2003 - Debt owing less than RM30,000 - Whether amendment to s. 5 Bankruptcy Act 1967 have retrospective effect - Whether creditor's rights affected*

On 1 October 2003, the Bankruptcy Act 1967 ('the Act') was amended by virtue of the Bankruptcy (Amendment) Act 2003 wherein the law had increased the threshold for bankruptcy adjudication from the previous requirement of RM10,000 to RM30,000 with effect from 1 October 2003. The facts in this present appeal arose from the filing of the bankruptcy notice on 24 April 2002 by the judgement creditor ('respondent') before the amendment to the Act wherein the deputy registrar had granted the adjudication order and receiving order ('AO & RO') on 10 October 2003 against the judgment debtor ('appellant') for the judgment debt of RM11,828.50. The appellant applied to court to annul the AO & RO under s. 105 of the Act on the ground that the AO & RO was *ultra vires* of the Act since the threshold was no longer RM10,000. On the contrary, the respondent submitted, *inter alia*, (i) that the amendment to s. 5(1) of the Act had no retrospective effect to cases prior to the amendment and (ii) that the creditor's petition was filed before the amendment, *ie*, on 10 March 2003. Hence, the issues that arose for determination herein were (i) when the bankruptcy proceeding had commenced and whether it was commenced before or after the amendment and (ii) whether the amendment to s. 5 of the Act had any retrospective effect.

Held (dismissing the appeal with costs):

(1) Based on s. 5 of the Act, a bankruptcy proceeding commences when the creditor's petition is filed. The fact that the creditor's petition was filed on 10 March 2003 and the amendment only came into effect on 1 October 2003, it was therefore clear that the

previous requirement of RM10,000 was still applicable in the absence of any express words to have indicated that the new amendment had any retrospective effect. (para 19)

(2) The amendment to s. 5 of the Act will affect the substantive right and as such, it should not have a retrospective effect. In this case, the substantive right of the creditor was affected because prior to the amendment, the creditor had the legal rights to commence bankruptcy proceeding against the debtor. Therefore, it was unfair to prevent the creditor's rights to proceed with the action after the amendment took effect (*United Asian Bank Bhd v. The Negeri Sembilan Development Corporation*; refd). (paras 20 & 21)

Case(s) referred to:
RHB Bank Bhd v. Ya'acob Mohd Khalib [2008] 1 CLJ 80 CA ***(refd)***
Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Berhad [1995] 1 CLJ 491 CA ***(refd)***
United Asian Bank Bhd v. The Negeri Sembilan Development Corporation [1988] 1 LNS 206 HC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 5(1)(a), 8(2)
Rules of the High Court 1980, O. 42 r. 7(2)

For the judgment creditor - Louis Achuk; M/s Kadir Wong Lin & Co
For the judgment debtor - Tai Choi Yu; M/s Tai Choi Yu & Co

Reported by Kumitha Abdul Majid

JUDGMENT

Zulkifli Bakar J:

Introduction

[1] The judgment creditor has obtained a judgment against the judgment debtor whereby by a registrar's certificate dated 7 March 2002, the judgment creditor obtained a taxed cost of RM11,828.50 against the judgment debtor. Subsequently, the judgment creditor proceeded with bankruptcy proceedings where the judgment creditor filed bankruptcy notice dated 24 April 2002 against the judgment debtor for the said taxed cost.

[2] On 1 October 2003, the Bankruptcy Act 1967 was amended through Bankruptcy (Amendment) Act 2003 where the law has increased the threshold for bankruptcy adjudication to RM30,000 from previous requirement of RM10,000 with effective date on 1 October 2003.

[3] On 10 October 2003, the deputy registrar granted the adjudication order and receiving order against the judgment debtor for the said taxed cost of RM11,828.50. Thereafter, on 30 June 2003, the judgment debtor applied to the court *via* summon in chamber to annul the adjudication order and receiving order under s. 105 of the Bankruptcy Act 1967 on the ground that the adjudication order and receiving order is *ultra vires* the Bankruptcy Act 1967 as the threshold has no longer RM10,000.

[4] However, the judgment creditor opposed the judgment debtor's application to annul court's order on the ground that the said order take effect from the day the bankruptcy notice was filed ie, 24 April 2002 which was before the amendment of the Bankruptcy Act 1967. Therefore, the increase in the threshold to RM30,000 did not apply to the cases prior to the amendment.

Appellant's Case

[5] The judgment debtor (hereinafter referred as 'appellant') in this case raised the issue as to whether the adjudication order and receiving order take effect retrospectively on the 24 April 2002 or from the date of adjudication order and receiving order on the 10 October 2003. The appellant submitted that the amendment of the Bankruptcy Act has a retrospective effect to cases prior 1 October 2003 which is before the amendment of the Bankruptcy Act 1967.

[6] Based on the submission of the appellant's counsel, he stated that it is not the bankruptcy notice that makes a person a bankrupt but it is the court order that makes the person to be a bankrupt. That is to say that, when the adjudication order and receiving order was granted on 10 October 2003, the previous requirement of RM10,000 to adjudge a person as bankrupt is no longer applicable due to the fact that the amendment of the Bankruptcy Act took effect on 1 October 2003. Therefore, it is submitted that, since the date of adjudication order and receiving order was on 10 October 2003 and the amendment of the Bankruptcy Act 1967 was made on 1 October 2003, the order should be annulled. This is because the said order was made after the amendment was passed.

[7] At this stage, the appellant's counsel relied on O. 42 r. 7 of the Rules of High Court 1980 whereby the law states as follows:

> A judgment or order of the court takes effect from the day of its date

[8] Order 42 r. 7(2) of the Rules of High Court further states as follows:

> Such a judgment or order shall be dated as of the day on which it is pronounced, given or made, unless the court orders it to be dated as of some other earlier or later day, in which case it shall be dated as of that other day

[9] Therefore, based on the above provision, the appellant submitted that the order granted on 10 October 2009 should be annulled on the ground that it is *ultra vires* with the new amended s. 5 of the Bankruptcy Act 1967.

Respondent's Case

[10] The judgment creditor (hereinafter referred as 'respondent') had filed a creditor's petition against the appellant on 10 March 2003, whereby the statutory limit for bankruptcy proceedings is RM10,000. The filing of the said creditor's petition was made around six months before the statutory limit was amended to RM30,000. Thereafter, the adjudication order and receiving order was granted on 10 October 2009 which was nine days after the said Act was amended. Therefore, the dispute that arose between the appellant and the respondent was whether or not the said amendment had a retrospective effect in the present case.

[11] It is not disputed by the respondent that the amendment to s. 5(1)(a) of Bankruptcy Act 1967 to increase the statutory limit of RM10,000 to RM30,000 for purpose of presentation/filing of the creditor's petition came into effect on 1 October 2003. It is also not disputed that the bankruptcy notice filed on 24 April 2002 was for claim of RM11,828.50. Furthermore, the respondent admitted that the creditor's petition was filed on 10 March 2003 and the appellant had been adjudged bankrupt on 10 October 2003.

[12] However, it is the respondent's submission that such an amendment is only to replace the statutory requirement of RM10,000 to RM30,000. There is nothing in the amendment which expressly states that the amendment to s. 5(1)(a) has any retrospective effect to cases prior to the amendment. It is submitted that attention should be given to the wordings of s. 5(1)(a) of Bankruptcy Act 1967 itself where the words used is "to present a bankruptcy petition". This clearly referred to the filing of creditor's petition. The said provision never stated anything which referred to the date of granting of adjudication order and receiving order as claimed by the appellant. Thus, based on the facts of

the case, the date of filing of the creditor's petition is before the amendment was made which is 10 March 2003. As such it is submitted that the statutory requirement to commence bankruptcy proceedings applicable to the present case is RM10,000.

[13] Therefore, the respondent submitted that the amendment to s. 5(1)(a) of the Bankruptcy Act 1967 has no retrospective effect due to the fact that there is no express provision to support that the amendment to affect bankruptcy cases retrospectively. In *Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Berhad* [1995] 1 CLJ 491 where in deciding the issue on how to determine the amendment to any written law as having retrospective or prospective effect, the court held as follows:

> in the absence of express words or necessary implication, statute affecting substantive rights are prospective while those affecting procedure are retrospective ... the correct test to be applied in determining the issue is to first ascertain whether it would effect substantive right if applied retrospectively. If it would, then *prima facie* the law must be construed as having prospective effect only, unless there is clear indication in the enactment that it is in any event to have retrospectivity

[14] In the present case, the amendment of s. 5(1)(a) of the Bankruptcy Act 1967 relates to the substantive rights of all creditors against debtors in regards to the rights of the creditors to file creditor's petition against any debtor whereby the statutory limit had been increased from RM10,000 to RM30,000. As such, by virtue of the above case, the new amendment of s. 5 should not be interpreted to have retrospective effect.

[15] In *United Asian Bank Bhd v. The Negeri Sembilan Development Corporation* [1988] 1 LNS 206; [1989] 1 MLJ 230 at 232, the court held that this court is of the view that the law cannot be made retrospective to deprive the right of a party that were legally enshrined by the relevant law at that point of time. It is most unfair to resort to retrospective enactment just to avoid a party's legal obligations. Therefore, based on the above authority the said amendment cannot be made retrospective to deprive the right of the creditor that was enshrined by the Bankruptcy Act as at the filing of the creditor's petition on 10 March 2003 and to avoid the liabilities/obligation of the debtor towards the creditor.

[16] The respondent also submitted that based on the case of *RHB Bank Bhd v. Ya'acob Mohd Khalid* [2008] 1 CLJ 80 which related to the amendment of s. 8(2) of the Bankruptcy Act 1967 where pursuant

to the Bankruptcy (Amendment) Act 1992, sub-s. 2A had been introduced as part of s. 8 of the said Act. The issue raised in this case is whether or not the amendment has any retrospective effect. The court held as follows:

> it could not therefore take away the plaintiff's accrues right under s. 8(2) of the Bankruptcy Act 1967 as the amending act did not clearly and specifically provide that sub-s. 2A would have retrospective effect. If read otherwise, it would produce an unjust result as sub-s. 2A dealt with a substantive right

[17] Therefore, based on the above reasons and in the absence of any express indication in the new amendment of s. 5, the respondent submitted that the amendment of s. 5 of Bankruptcy Act 1967 has only prospective effect.

The Court's Findings

[18] By virtue of the submission of both counsels, the court found that there are two crucial issues to be determined at this stage:

(a) When the bankruptcy proceedings had commenced and whether it was commenced before or after the amendment;

(b) Whether or not the amendment of s. 5 of the Bankruptcy Act 1967 had any retrospective effect.

[19] Firstly, before the court determines the issue of retrospective effect, it is also important to clarify on the issue of whether the bankruptcy proceedings had commenced before or after the amendment was made. This is important to determine whether or not the new amendment is applied to the cases involved. At this stage, the court would agree with the submission of the respondent where based on the wordings of s. 5 of the Bankruptcy Act 1967 itself, it is a clear law that a bankruptcy proceeding is commenced when the creditor's petition is filed. In regards to the present case, the fact that the creditor's petition was filed on 10 March 2003 and the amendment only came into effect on 1 October 2003, it is therefore clear that the previous requirement of RM10,000 is still applicable to the present case in the absence of any express words to indicate that the new amendment has any retrospective effect.

[20] Secondly, in determining this issue the court is guided by the authorities such as in the case of *Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Berhad* [1995] 1 CLJ 491 where the court held that in the absence of express words, an amendment of a written law cannot be held to have any retrospective effect if the amendment affects

the substantive right of the parties. At this stage, the court agrees with the respondent's submission that the amendment of s. 5 of the said Act will affect the substantive right and as such the amendment should not have retrospective effect. As in the present case, the substantive rights of the creditor is affected because prior to the amendment, the creditor has a legal right to commence the bankruptcy proceeding against the debtor.

[21] Based on *United Asian Bank Bhd v. The Negeri Sembilan Development Corporation* [1988] 1 LNS 206; [1989] 1 MLJ 230 at 232 the law clearly states that the court of law is of the view that it is unjust to allow any retrospective effect of any written law to deprive the right of a party that were legally allowed by the relevant law at that point of time. Similarly in the present case, prior to 1 October 2003 when s. 5 of the Bankruptcy Act 1967 was amended, the creditor clearly has the right to commence the bankruptcy proceeding. Therefore, it is unfair to prevent the creditor's right to proceed with the action after the amendment took effect on 1 October 2003 after the creditor's petition had been filed on 10 March 2003.

[22] Furthermore, in *RHB Bank Bhd v. Ya'acob Mohd Khalid* [2008] 1 CLJ 80 the situation has been crystallized by this recent case where the court held the view that it is unjust to allow a new amendment of s. 8 of the Bankruptcy Act 1967 to have any retrospective effect in the absence of any express indication or wording in the provision.

[23] Therefore, based on the above reasons, this court is of the view that the amendment of s. 5 of the Bankruptcy Act 1967 has no retrospective effect to cases prior to the amendment. The respondent as judgment creditor still has the right to proceed with the bankruptcy proceeding which they were entitled to prior to the amendment. Therefore, the appellant's appeal is dismissed with cost to be taxed unless agreed.